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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD; ET AL.,

Appellants,

vs.

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM

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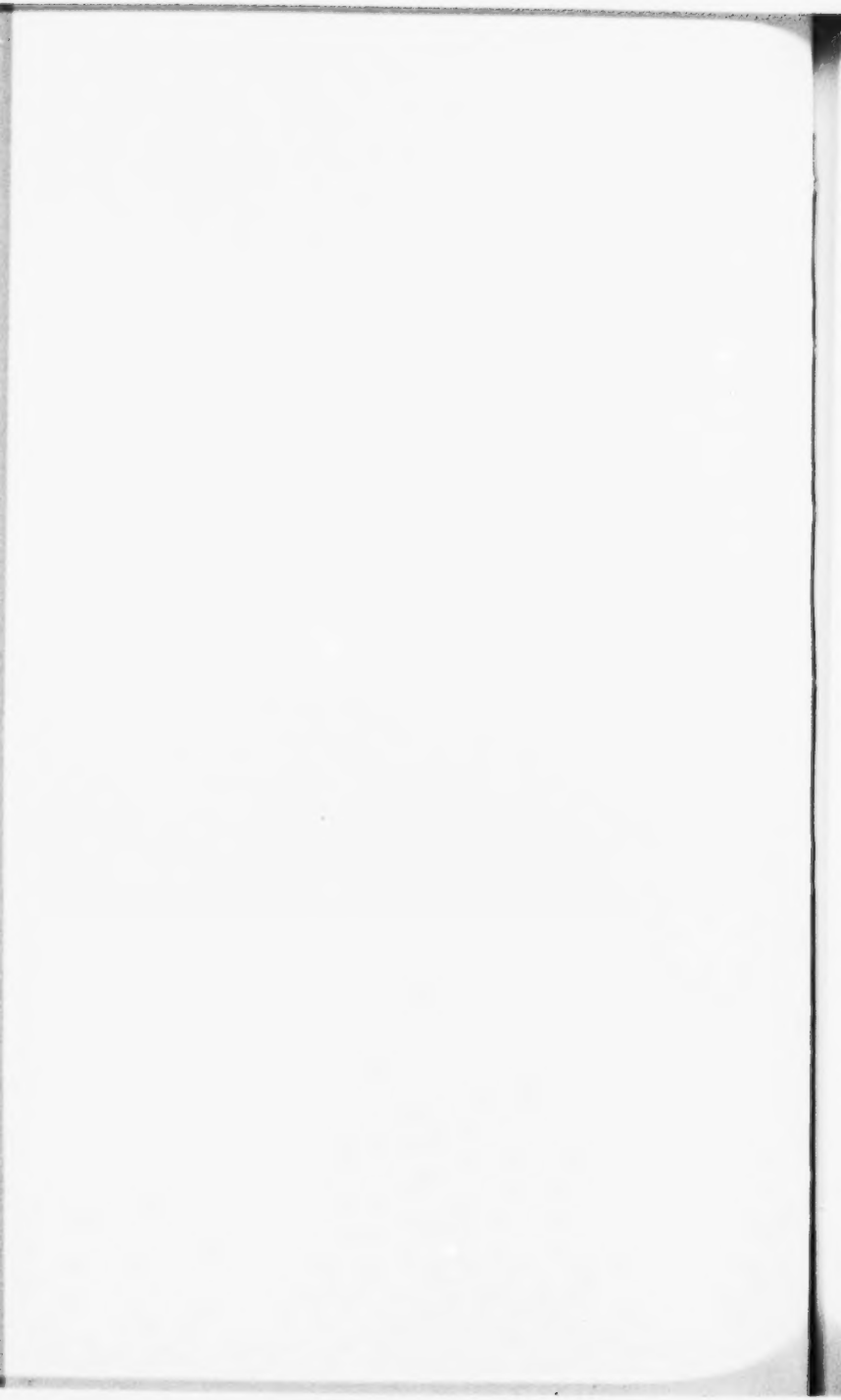

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 32541

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION,

Plaintiff-Appellee,

vs.

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD; ET AL.,

Defendants-Appellants

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM

The appellee in the above-entitled cause for its statement in opposition to appellants' statement as to jurisdiction herein, respectfully shows the following:

Statement

Appellee corporation has been engaged since before 1950 in the production, modification and overhaul of military aircraft and equipment under contracts with the United States Air Force. Its plants are located at Tucson, Arizona,

and Glendale, California. This suit was brought to restrain an administrative proceeding instituted to impose penalties on appellee for alleged violations of wage stabilization regulations.

Wage stabilization was inaugurated under authority of the Defense Production Act of 1950 (50 U. S. C. App. 2061, et seq., 64 Stat. 798). On September 9, 1950, an Economic Stabilization Agency, headed by an Economic Stabilization Administrator, was created by Executive Order 10161, 15 F. R. 6105. On July 30, 1952, administration of wage controls was delegated by the Administrator to the Wage Stabilization Board established by Section 403(b) of the Defense Production Act, as amended in 1952, 50 U. S. C. App. 2103(b), 66 Stat. 300.

The Administrator established sanctions for violations of wage regulations in his General Order 15 (17 F. R. 2994, 9977). This regulation provided for disallowance by governmental agencies of the cost of wages paid in violation of regulation. It specified that the amount to be disallowed was the entire amount of the wage paid in violation, not merely the excess over the legal payment, unless particular extenuating circumstances were found to exist. The statutory authority apparently relied upon was Section 405(b) of the Act, 50 U. S. C. App. 2105(b) which provides as follows:

> "No employer shall pay, and no employee shall receive, any wage, salary or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation."

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In addition to establishing sanctions, the Administrator also provided for administrative adjudication of alleged violations, creating a National Enforcement Commission for this purpose. (General Order 18, 17 F. R. 6925, 9977, issued July 30, 1952). If it found there had been a violation, the Commission was directed to certify to other government agencies, and to direct such agencies to disregard for purposes of determining costs, the amount of wages paid in violation.

Disallowance of wages for income tax purposes has been the principal result of a determination of violation.

Conduct of proceedings before the National Enforcement Commission was governed by General Procedural Regulation 1, Revised (17 F. R. 7737, 18 F. R. 1663). Initial decisions were made by Enforcement Commissioners, appointed by the Commission to conduct the hearings, to make findings, and to recommend the amounts to be disallowed. If no appeal to the Commission was taken from such findings, they became final in the absence of clear error and the recommended amount of disallowance was adopted.

On November 4, 1952, the Wage Stabilization Board filed a complaint with the National Enforcement Commission against appellee, alleging, without greater particularity, that appellee had, during the period from January 26, 1951, to January 1, 1952, granted to its employees wage increases in violation of General Wage Stabilization Regulation 1 (the wage-freeze regulation). On November 21, 1952, appellee moved the National Enforcement Commission for a more definite statement of the allegations contained in the complaint.

On December 6, 1952, industry members of the Wage Stabilization Board resigned and were never replaced. A Wage Stabilization Committee, composed of the public

members of the Board, was appointed by the Administrator. (General Order 19, 17 F. R. 11368.)

On December 15, 1952, the wage complaint was ordered amended by the National Enforcement Commission by a statement that the wage increases complained of were those shown as "merit" increases on appellee's records, that such increases required prior approval of The Wage Stabilization Board, and that such approval had not been obtained. Subsequently, appellee was advised by the Regional Council of the Twelfth Regional Wage Stabilization Board that the total payroll allegedly in violation was over five and one-half million dollars. Disallowance of this payroll for income tax purposes would result in the assessment of two to three million dollars additional income tax for the year 1951.

A hearing before an Enforcement Commissioner was set for February 24, 1953. The present suit was instituted February 13, 1953 against the officials and agents of the Wage Stabilization Committee and the National Enforcement Commission threatening to conduct said hearing. Service was obtained upon regional wage officials and the Enforcement Commissioner designated to conduct the administrative hearing. National committee and commission officials were not served and, with the exception of defendant Groner, who argued the case for defendants, did not appear in the action.

Appellee's complaint alleged that the threatened application of Section 405(b) against appellee was repugnant to the United States Constitution. Alternatively, it was alleged that the regulations and orders establishing the National Enforcement Commission and providing for certifications of disallowance were unauthorized by the Act. Appellee alleged that it would be irreparably injured by appellants' threatened action in holding a hearing prin-

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cipally because of the disastrous effect such a hearing would have on appellee's ability to obtain indispensable weekly loans under an existing credit agreement with certain banks.

Lengthy oral argument on appellee's application for a preliminary injunction was held before a three-judge court and on March 11, 1953, a temporary restraining order was issued against appellants. An interlocutory injunction was issued by said court on May 28. Appellants' application for stay of the interlocutory injunction pending appeal was denied by this court June 15, 1953 (345 U. S. 988). Trial was held July 24 and further oral argument was heard at that time. A decree permanently restraining appellants from prosecuting or hearing the charges brought against appellee was granted by the three-judge court on July 31.

The district court found that there was no statutory authority for the imposition of penalties by the National Enforcement Commission but that jurisdiction was in the district courts. It further found that the very continuance of the threatened administrative hearing would cause appellee's bank credit to be cut off, which would disable appellee from continuing in operation and would thereby cause irreparable injury. The grounds for these conclusions were amplified in a written opinion.

Statutes Involved

In addition to the statutes set forth in Appendix B of Appellants' Statement as to Jurisdiction, other provisions of the Act pertinent to the issues discussed herein are set forth in Appendix A attached hereto.

The Judgment of the District Court Should Be Affirmed

Appellant invites review of the district court's judgment on the ground that the decision jeopardizes about 2,500 proceedings in which disallowances have already been

determined or stipulated. It is intimated that all violators of wage regulations will, as the result of such judgment, be enabled to avoid the consequences of their conduct. Why appellee's rights should depend upon the fact that appellants have for several years been conducting hearings and certifying disallowances without statutory authority is not made clear.

Furthermore, the intimation that punishment will be circumvented is without foundation. First, it is doubtful that stipulated settlements could be reopened in any event. Stipulations are required to set forth facts establishing the violation of a wage order and the existence of extenuating or mitigating circumstances justifying disallowance of less than the full amount of the illegal payment (General Procedural Regulation 1, Revised, Sec. 8.1(b), 17 F. R. 7737). The district court merely held that violations were to be determined and penalties imposed by the district courts. Settlements of liability are not prohibited and these stipulations constitute admissions which undoubtedly would prevent recovery in any refund suit. Second, even in the case of disallowances resulting from contested proceedings, appellants do not suggest that a federal court in a refund suit (in which the plaintiff must show he is justly entitled to refund) could not itself determine whether a violation had occurred and uphold any tax disallowance. As a matter of fact, the district court here concluded that there was such jurisdiction.

I

The Defense Production Act of 1950 Authorizes the Courts, Not the Executive, to Determine Whether the Act Has Been Violated, and to Impose Penalties Prescribed by the Executive.

Appellants assert that the President had power under Section 405(b) to direct the executive departments to dis-

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regard for tax computation and other purposes, wages paid in violation of wage ceilings. This view is not at variance with that of the district court, which recognized in its opinion that ". . . the Act authorizes the President to prescribe the *extent* to which any unauthorized payment . . . may be disregarded. . . ." Section 405(b), by its very terms, went this far but no further. In order to sustain the claimed authority of the National Enforcement Commission, there must be read into the section further executive authority to *adjudge* that a violation has occurred and to decree imposition of the penalties prescribed. It is respectfully submitted that no such authority existed and that the executive authority given by Section 405(b) was exhausted after the establishment in Section 4 of General Order 15, (17 F. R. 2994, 9977), of the standards for the disallowance of payments in violation of the statute.

The plain words of Section 405(b) authorized the executive to promulgate rules establishing penalties. The plain words of Section 706(b), 50 U. S. C. App. 2156(b), granted to the district courts the authority to adjudge whether violations occurred and to impose the prescribed penalty:

> "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder . . ."

Appellants attempt to dispose of this section by arguing it was limited in application to injunction suits and criminal prosecutions (Appts'. Statement, pp. 7-8), but this construction simply ignores the breadth and inclusiveness of the language used.

It is said that the Act exhibited Congressional intention to vest the President with authority to combat inflation, and appellants cite numerous sections from Title IV to show that the President had broad powers. But the sections cited uniformly conferred rule-making, as opposed to *adjudicatory*, power. The argument really proves that Section 405(b) was also intended to relate only to rule-making. This crucial distinction between the two kinds of power was observed by the district court.

Legislative history does not furnish support for the construction proffered by appellants. Admittedly, Section 405(b) follows the language of Section 5(a) of the Stabilization Act of 1942, 50 U. S. C. App. 965(a), 56 Stat. 767. However, even assuming the validity of administrative determinations of violation under that act—and, as we point out below, no court has passed upon the point—the legislative history of the 1950 Act does not indicate any Congressional awareness, much less approval, of such administrative procedure. On the contrary, the Senate Committee Report merely noted the similarity in *language* and stated that disallowance was an effective deterrent (S. Rep. No. 2250, 81st Cong., 2d Sess. p. 39, 1950), while the House and Conference reports did not even mention the provision (H. R. Rep. No. 2759, H. R. Rep. No. 3042 (on H. R. 9176), 81st Cong., 2d Sess., 1950). Even if it were shown that the Congress which passed the Defense Production Act was aware of the World War II administrative practice we submit that Congress' intent to repudiate and prevent such practice was manifested by the enactment of a specific provision giving the district courts jurisdiction of ". . . violations of this Act or any rule, regulation, order, or subpena thereunder. . . ." (Sec. 706(b)). This provision, *enacted for the first time in 1950*, marked a complete departure from the 1942 Act and rendered irrelevant any argument based on construction of the earlier act. See the decision directly in

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point in *Belcher Oil Co.* v. *Griffin*, 23 CCH Lab. Cas., Par. 67,723 (D. C. N. D. Ga. 1953).

Appellants urge legislative "ratification" of their action by the Supplemental Appropriation Bill of 1954 (Pub. L. No. 207, 83d Cong., 1st Sess.) passed months after both the suspension of wage controls and the expiration, on April 30, 1953, of authority conferred under Section 405(b) (*cf.* Section 717). But the appropriation in Public Law 207 for the "Economic Stabilization Agency" cannot be said to indicate the specific approval of the action of the National Enforcement Commission which is required by the doctrines of *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 118 (N. 10), 67 S. Ct. 1129 (1947), and *Brooks* v. *Dewar*, 313 U. S. 354, 61 S. Ct. 979 (1941), compare *Ex Parte Endo*, 323 U. S. 283, 303 (N. 24), 65 S. Ct. 208 (1944), particularly in view of the fact that the Economic Stabilization Agency's principal activity at the time was in connection with rent control. In fact, members of the Senate Committee on Appropriations, upon being apprised of the pendency of the present case, clearly recognized that the issues presented were for the courts to decide (Hearings Before the Senate Committee on Appropriations on the Supplemental Appropriation Bill, H. R. 6200, 83rd Cong., 1st Sess., pp. 424-434). And, in the full context cited, it can be seen that the statement of appellee's representative Holland, relied on so heavily by appellants, could not be understood even as dealing with, much less as "conceding", the validity of the National Enforcement Commission's establishment.

Several cases are cited by appellants as upholding, under the 1942 Act, the administrative imposition of disallowances. Of them two things may be said. First, they involved a different statute, which made no provision for adjudication in the district courts. Second, in none of them was the issue raised of the agency's power to make deter-

minations of violations for disallowance purposes. In *Troy Laundry Co.* v. *Wirtz*, 155 F. 2d 53, 55 (9th Cir. 1946), *cert. denied*, 329 U. S. 723 (1946), the issue was the subpena power of the War Labor Board. The court treated the administrative hearing involved as one intended to "enable the President to perform his administrative function with reference to the fixing of prices for commodities or services in which the wage is a factor", and again, as one intended "to enable him to perform his function of fixing the price of the service or goods referred to above." In *De La Rama S. S. Co.* v. *Pierson*, 174 F. 2d 84 (9th Cir. 1949), a contract action involving the defense of illegality, there is neither a holding nor language remotely in point. In *Woodworth Co.* v. *Kavanagh*, 102 F. Supp. 9 (D. C. E. D. Mich. 1952), *aff'd per curiam*, 202 F. 2d 154 (6th Cir. 1953), the distinction between prescription and imposition of penalties was not discussed by the court and was not raised by counsel (Brief of Appellants, pp. 12-13, Transcript of Record, p. 6). In *Weather-Seal Mfg. Co.* v. *Commissioner*, 16 T. C. 1312 (1951), *aff'd mem.*, 199 F. 2d 376 (6th Cir. 1952), only the constitutionality of disallowing wages as tax deductions was in issue. Our disagreement with the *Woodworth* and *Weather-Seal* cases—both of which received memorandum affirmance from the Sixth Circuit—is noted below, but it is not upon the ground that those cases are opposed to the reasoning of the district court here.

II

Appellee Would Be Irreparably Injured by a National Enforcement Commission Hearing, Regardless of the Outcome.

The district court found, as stated in its Findings of Fact, "that the continuance of the threatened administrative proceeding will cause plaintiff's bank credit to be shut off and

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will disable plaintiff from continuing its operations." This finding was based upon uncontradicted evidence, including the testimony of an official of one of the banks extending credit to appellee, and upon examination of the existing credit agreement. Appellants do not, nor could they reasonably, assert that the finding was unsupported by evidence.

Appellants argue that the district court is in error because no tax disallowance sanction could have been assessed by the Enforcement Commissioner, that he could do no more than issue an advisory opinion to the Commission. This argument completely ignores the specific finding quoted above, for the district court was not concerned with the stage of the proceedings at which finality would attach but rather with what would in fact happen to appellee's extension of credit if the hearing were held at all. In any event, the premise is false. The Enforcement Commissioner's determination has many aspects of finality. He is directed to issue his "Findings and Determination" and if no appeal is taken therefrom these "shall, in the absence of clear and prejudicial error, be adopted by the National Enforcement Commission and a certificate of disallowance based thereon issue . . ." (General Procedural Regulation 1, Revised, Sec. 4.1(f), 17 F. R. 7737).

The decision in the case of *Grand Central Aircraft Co.* v. *Jones*, No. 15603, D. C. S. D. Cal., which was adverse to appellee on the issue of equitable jurisdiction, was not only handed down before trial, while full trial was held by the district court here, but was issued without the benefit of any oral argument. The cases cited therein rest on the doctrine of exhaustion of administrative "remedies". None of them holds that such exhaustion is required where, as found by the district court herein, a plaintiff would thereby be forced out of business and hence would be deprived of all recourse to the courts.

III

The National Enforcement Commission's Threatened Action Was in Violation of Statute upon Grounds Additional to Those Relied upon by the District Court.

The district court's judgment may be supported upon other statutory grounds in addition to those relied upon by that court.

A. The Commission Had No Authority to Make Determinations After April 30, 1953

Although it did not reach the point, the district court noted, in its opinion, that there was substantial merit in appellee's argument that any authority of the National Enforcement Commission ceased in any event on April 30, 1953, under Section 717 (50 U. S. C. App. 2166). This ground is respectfully urged in support of the district court's judgment.

Section 717(a), as amended (50 U. S. C. App. 2166(a)), provides:

> ". . . titles IV and V of this Act and all authority conferred thereunder shall terminate at the close of April 30, 1953."

Hence, Section 405(b), part of Title IV, expired on April 30. When a statute is repealed, or, as in the case of Title IV, expires under its own terms, any liability created ceases, in the absence of a "savings" clause. *United States* v. *Ship Helen*, 6 Cranch 203 (1810).

Section 717(b)(3), 50 U. S. C. App. 2166(b)(3), provides:

> "Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency."

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This section did not permit continuance of the Commission for two reasons. First, it was not invoked. The language "may be continued" is permissive only. It obviously did not permit the agency to continue itself, and no higher authority issued any order continuing the agency prior to the expiration of its powers. Second, an agency could be continued only "for purposes of liquidation." It is submitted that this did not mean doing business as usual. Even if the agency were properly continued in existence, it could not hold hearings, for conducting such hearings would be merely a continuation of its pre-April 30 activities and would render meaningless the clause "for purposes of liquidation."

Nor was the threatened proceeding saved by the specific "savings" clause in Section 706(b), 50 U. S. C. App. 2156(b):

> ". . . The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued, thereunder, shall not operate to defeat any suit, action, or prosecution, whether heretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order. . . ."

This provision was not intended to apply to administrative proceedings. First, it appeared in a section dealing exclusively with court litigation. Second, the language was not applicable to administrative proceedings. A "suit" is an equity case, an "action" is a law case, and a "prosecution" is a criminal case. And when Congress intended to include an "administrative proceeding" within the scope of any provision of the Act, it specifically used the term, as in the case of the "immunity bath" provision, Section 705(b), 50 U. S. C. App. 2155(b), which refers to the "grand jury

or in any court or administrative proceeding." Compare, in this connection, Executive Order 10434, 18 F. R. 809, suspending controls, which contained a savings clause covering "any suit, action, prosecution, or administrative enforcement proceeding."

Nor was the general "savings" clause, 1 U. S. C. Sec. 109, 61 Stat. 633, applicable. It was clearly superseded by the specific savings clause in the Defense Production Act. *Hertz v. Woodman*, 218 U. S. 205, 30 S. Ct. 621, 625 (1910).

The legislative history of the Supplemental Appropriations Bill of 1954, Public Law 207, 83d Cong. 1st Sess., gives strong support to the contention that any adjudicatory authority possessed by the National Enforcement Commission expired on April 30, 1953. The Economic Stabilization Agency had requested $290,000 for liquidation. This amount included expenses of "Wage & Salary Enforcement," "Supervision," "Legal Protests to Price Regulations," "Price Enforcement" and "Fiscal Operations." (Hearings Before the Senate Committee on Appropriations on the Supplemental Appropriation Bill, H. R. 6200, 83d Cong., 1st Sess., pp. 457, 464-466.) The Senate committee reduced the House appropriation by $290,000, struck the reference to the Economic Stabilization Agency, leaving funds available only for the Office of Rent Stabilization, and reported as follows to the Senate:

> "It is the sense of the committee that pending cases should be turned over to the Department of Justice for review, so that the agency will not be continued by a continuation of these suits." (S. Rep. No. 677, 83d Cong., 1st Sess., p. 17).

On the Senate floor, the $900,000 recommended by the Committee was raised to $1,500,000, solely in order to make provision for terminal leave payments (99 Cong. Rec. No. 144, p. 10712). The committee's directive was in no way

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modified by such action. And even the increased appropriation for terminal leave purposes was reduced by the Conference committee to $1,200,000. While it was necessary to make the appropriation available to the Economic Stabilization Agency so that terminal leave could be paid to employees besides those in the Office of Rent Control, it is clear that there was no intention to restore amounts for continuation of administrative disallowance proceedings, which the Senate committee had recognized were outside the liquidation function. (H. R. Rep. 1090, 83d Cong., 1st Sess., pp. 5, 13, Amdts. 76, 77.)

B. The Collapse of the Tripartite Wage Stabilization Board Destroyed the Statutory Scheme for Administration of Wage Controls

Under Section 403(b)(1) of the Act, added in 1952, (50 U. S. C. App. Section 2103(b)(1), 66 Stat. 300), Congress created a Wage Stabilization Board composed of public, industry, and labor members, apparently believing that the interests of labor and industry could only be protected with such a Board as a watchdog, even though the ultimate power be in the Economic Stabilization Administrator. Yet there has been no statutory Wage Stabilization Board since the resignation of industry members on December 6, 1952. The Administrator sought to fill this gap by creating an all-public-member Wage Stabilization Committee on December 15, 1952 (17 F. R. 11368). He, of course, had no authority to take action clearly conflicting with the express will of Congress, and Congress had expressly disapproved establishment of a wage board composed solely of public members, (S. Rep. 1599, 82d Cong. 2d Sess.).

The significance of this development in the present case is that the Board was vested with the function, under Section 403(b)(5), (50 U. S. C. App. Sec. 2103(b)(5)), of ad-

vising as to "the application to particular circumstances of policies and regulations promulgated by the Administrator" and relating to wages. Under this provision appellee would have been entitled, as a matter of right, had the Board not been defunct, to have sought a ruling by the Board that appellee's wage increases were authorized under the applicable regulations, or, at least, to have obtained an interpretation as to the application of the regulations in the particular circumstances. Such advice from the Board would have gone far to preclude agents of the Administrator from seeking the commencement of court action, or, if the administrative enforcement procedure were valid, would have been binding upon the National Enforcement Commission. However, from December 6, 1952—before appellee was apprised of the particular grounds upon which it was alleged to have violated the applicable regulations—this route through which appellee could have obtained relief was closed.

C. The Governing Regulations Were Invalid Because of the Absence of Adequate Statements of Considerations

The administrative disallowance procedure was invalid not only because unauthorized by statute, but also because the regulations purporting to establish it were void for lack of an adequate statement of considerations. Section 709 (50 U. S. C. App. 2159) required that any rule or regulation issued under authority of the Act be accompanied by a statement that in its formulation there was consultation with industry representatives and that consideration was given to their recommendations, or that special circumstances rendered such consultation impractical or contrary to the interest of national defense. It further provided that no rule should be held invalid by reason of a finding that such statement was *inaccurate*.

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Neither General Order 15 (17 F. R. 2994, 9977), General Order 18 (17 F. R. 6925, 9977), nor General Procedural Regulation 1, Revised (17 F. R. 7737, 18 F. R. 1663), contained a statement of considerations adequate under this section. Yet the requirement of a statement applied to "all" regulations; this was recognized by the agencies themselves, as was demonstrated by the half-hearted attempt at compliance in General Procedural Regulation 1, Revised, *supra*.

The section declared that a regulation should not be held invalid for non-compliance with the section's requirements only in one instance—where the statement was inaccurate. The clear implication was that in all other instances of non-compliance with the section's requirements, such as complete omission of the statement or the statement's failure to set forth the fact of consultation or non-consultation with industry representatives, the regulation *was* invalid. The result was to require a statement of considerations but to prevent collateral inquiries. Such inquiries would be unnecessary; Congress could assume the truth of the statement because the possibly burdensome requirement of consultation could be avoided by the agency's written statement that consultation was impracticable. But Congress did put agencies under a duty to consult when practicable and concluded that the best way of insuring compliance, without injecting extraneous issues into every suit for violation, was to require that a statement of considerations be made. Because of the complete absence of such a statement the cited regulations are, we submit, invalid.

D. The Regulation Which Prescribes the Extent to Which Wage Payments May Be Disallowed Is Void

While Section 4 of General Order 15 (17 F. R. 2994, 9977) provided that the entire amount of any wage paid

in violation of regulation could be disallowed, we submit that such an interpretation was in conflict with the authority granted by Section 405(b) of the Act and that only the excess illegally paid was subject to disallowance. Only that part of the wage payment in excess of the allowable was "in contravention" of any regulation. Suppose, for example, that instead of an illegal salary increase, an illegal bonus had been given to an employee. Obviously, only the bonus payment was illegal and the regular paycheck was not an illegal payment. The same should have been true where an employer improperly granted an illegal raise. We are aware that under the 1942 Act a contrary point of view was expressed in *Woodworth* v. *Kavanaugh*, 102 F. Supp. 9, D. C. Ed. Mich., 1952; *aff'd. per curiam*, 202 F. 2d 154 (6th Cir., 1953), but the court's discussion of the subject is not convincing and the only question properly before the court was the Government's motion to dismiss on other grounds.

E. General Order 15, in Denying Any Judicial Review of Disallowance Proceedings, Was Unauthorized by the Act and Deprived Appellee of Due Process of Law

The difficulty with appellants' theory that the Act authorized administrative disallowance proceedings is emphasized by the provision in Section 6 of General Order 15 (17 F. R. 2994, 9977), that determinations of violations and disallowances "shall be final and not subject to review by the Tax Court of the United States or by any court in any civil proceeding".

As we discuss below, Congress concededly intended to make wage regulations non-reviewable. But there is no indication that *disallowances* were not to be subject to review. The penalty provided by Congress for a wilful violation is $10,000 (Sec. 409(b), 50 U. S. C. App. 2109(b));

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the penalty authorized by General Order 15, if the order was legal, amounted to several millions of dollars in the instant case if there had been a violation. This is shockingly severe. Certainly, if Congress had intended to permit findings of violation, resulting in the imposition of such a penalty, by the extraordinary procedure of a non-reviewable administrative determination without the safeguards of a jury trial or the rules of evidence, it clearly would have said so in no uncertain terms. Yet there is not one single provision in the Act providing for notice, hearing and other procedures which would insure fairness in administrative disallowance determinations. Even the protection provided in the Administrative Procedure Act is not applicable to any administrative hearings necessary under the Defense Production Act (Sec. 709, 50 U. S. C. App. 2159). Surely if Congress had intended a determination of disallowance by administrative action it would have made some provision granting, defining, and limiting such administrative authority.

It is therefore clear that the provision for complete administrative finality not only rendered illegal the entire administrative proceeding, because it denied due process of law for the reasons discussed in point IV(A)(1) below, but was also unauthorized under the Act.

Of course, no problem could have existed in this connection had disallowances been sought in the district courts, as the statute directed.

IV

The Threatened Application of Title IV and Section 405(b) of the Act Against Appellee Was Unconstitutional

While the District Court properly avoided the constitutional issues raised by the Complaint, we respectfully urge these issues before this Court as constituting additional support for the judgment below.

A. Title IV of the Defense Production Act Denied Appellee Due Process of Law

1. *Lack of Judicial Review.* No provision was made in the Defense Production Act for judicial determination of the validity of wage and salary regulations, although there was detailed provision (Secs. 407, 408, 50 U. S. C. App. 2107, 2108) for such review of price regulations. This lack of provision for review in the statute itself, taken in conjunction with the Congressional history explaining the reason for such absence (96 Cong. Rec. 12133, 12480, 14072-14073), showed persuasively that Congress intended that such regulations be non-reviewable. However practical the reason for this withdrawal of review, it clearly contravened the due process clause of the Fifth Amendment. *Ng Fung Ho* v. *White*, 259 U. S. 276, 42 S. Ct. 492 (1922); *see Estep* v. *United States*, 327 U. S. 114, 120, 66 S. Ct. 423 (1945). Thus, the effect of the statute was not only to require submission to a challenged regulation, in the face of the risk of heavy penalty—a procedure held unconstitutional in prior Supreme Court cases of unimpaired authority, *Southwestern Telephone & Telegraph Co.* v. *Danaher*, 238 U. S. 482, 490, 35 S. Ct. 886 (1914); *Wadley Southern R. Co.* v. *Georgia*, 235 U. S. 651, 662, 35 S. Ct. 214 (1918)—but, as extended by the Administrator (General Procedural Regulation 1, Revised, sec. 10.1, 17 F. R. 7737), to prevent any challenge of the regulations even in a proceeding brought to determine violation. The unconstitutionality of such a procedure is highlighted when the heavy penalties which Section 405(b) of the Act purportedly authorized are considered.

2. *Excessive Penalty Without Relation to Damages Suffered.* The regulations of the Economic Stabilization Administrator interpreted the statute as authorizing dis-

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allowance of the entire amount of wage paid in violation of regulation, not only of the illegal excess (General Order 15, 17 F. R. 2994, 9977). While we submit that this construction was untenable, if the statute did authorize disallowance of the entire amount then it is clear that the penalty bore no relation either to the damage to the public interest or to the extent of the violation or to any other standard. In some cases, the amount of excess might have been very small and the remaining wage very large, while in others the amount of excess itself might have been very large—yet there was no statutory differentiation between the minor violation and the major violation and the lack thereof rendered the statute invalid, *Missouri Pacific Railway Co.* v. *Tucker*, 230 U. S. 340, 351, 33 S. Ct. 961 (1912). Furthermore, application of the penalty of tax disallowance denied due process to the extent that different monetary penalties resulted solely because of the tax bracket of the particular employer-taxpayer and without relation to the degree of the violation. Nor, it is interesting to note, did the regulations governing the disallowance standards to be followed make any express provision for mitigating the effect of these inequalities, although providing for other mitigating circumstances (General Order 15, Section 4, 17 F. R. 2994, 9977).

B. Section 405(b) as Interpreted by Appellants Denied Appellee Its Right to a Jury Trial Under the 6th Amendment

The disallowance provision of the statute, at least to the extent that the entire amount of a wage could be disallowed, clearly imposed a penalty and in an action on a statutory penalty, analogous to the common law action of debt, the constitutional right to a jury trial must be recognized. *People ex rel Lemon* v. *Elmore*, 256 N. Y. 489, 177 N. E. 14,

75 A. L. R. 1292 (1931); *Leimer* v. *Woods*, 196 F. 2d 828, 834 (8th Cir. 1952). Yet no jury trial was available in administrative disallowance proceedings which appellants claim were authorized by the statute. While it can be said that the imposition of penalties for wage violations was not a proceeding known to the common law, this fact does not furnish the premise for an argument that the right to a jury trial need not have been afforded, for it proves too much. If it were a complete answer to say that any administrative proceeding is an action unknown to the common law, then Congress could, by statutory enactment, destroy the right of trial by jury. By such specious reasoning the effectiveness of the 6th Amendment would be completely nullified. *See United States* v. *Jepson*, 90 F. Supp. 983, 986 (D. C. N. J. 1950). Cases such as *National Labor Relations Board* v. *Jones Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615 (1937), and *Helvering* v. *Mitchell*, 303 U. S. 391, 58 St. Ct. 630 (1938), involved merely remedial sanctions and hence are distinguishable.

C. Disallowance of Wage Payments for Tax Purposes Resulted in the Imposition of a Tax on Gross Receipts and Was Unconstitutional

Under Article 1, Section 9, of the Constitution, a tax on gross receipts is unconstitutional unless apportioned. *Pollack* v. *Farmers Loan and Trust Co.*, 157 U. S. 429, 15 S. Ct. 673 (1895). By the statutory device of disallowance, the right to include wages as part of the cost of goods or services sold for income tax purposes was impaired. The result was imposition of a gross receipts tax, not permitted by the Sixteenth Amendment. *Cf. Doyle* v. *Mitchell Bros.*, 247 U. S. 179, 38 S. Ct. 467 (1918); *Lela Sullenger*, 11 Tax Court 1076 (1948); *but cf. Weather-Seal Mfg. Co.* v. *Commissioner*, 16 T. C. 1312, *aff'd mem.*, 199 F. 2d 376 (6th Cir.

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1952). See also *Commissioner* v. *Weisman*, 197 F. 2d 221 (1st Cir. 1952), a case involving price disallowance, where the court carefully avoided the constitutional issue but nevertheless noted (at note 1, p. 224) that under Section 405(a), 50 U. S. C. App. 2105(a), which is identical in effect with Section 405(b):

> "It is possible . . . that in effect the tax levied would amount to a gross receipts tax."

D. Other Constitutional Objections

Other doubts concerning the constitutionality of Section 405(b), as urged in appellee's complaint, are that the section involved an unconstitutional delegation of legislative power; that its application resulted in the imposition of an excessive fine, prohibited by the Eighth Amendment; and that its application impaired the obligation of contracts and thereby denied due process of law.

Conclusion and Motion to Affirm

Under the district court's construction of the statute many of the difficulties raised by an administrative proceeding are obviated. Thus, construing the grant of jurisdiction over violations to the federal courts to be unlimited and therefore to include authority to impose disallowance penalties is not only in accordance with the express terms of Section 706(b) (50 U. S. C. App. 2156(b)), but such construction avoids constitutional issues of denial of judicial review and right to jury trial. The construction of Section 405(b) (50 U. S. C. App. 2105(a)) need not be strained to derive administrative authority to determine violations when such authority is not granted expressly. The absence of specification of notice and hearing procedures which are ordinarily part of a grant of administrative adjudication authority—indeed, the expressed inapplicability of the Administrative Procedure Act—requires no dubious impli-

cation that such procedures were intended when it is recognized that administrative adjudication was not intended. The "savings" clause in Section 706(b) (50 U. S. C. App. 2156(b)) can be applied to save all liabilities, as would not be the case if some were enforceable only by agency action, authority for which has already expired. The term "liquidation" need not be construed to authorize doing business as usual.

In view of the above, the entire proposed administrative enforcement proceeding against appellee, through a commissioner of the National Enforcement Commission, was illegal under the statute. Consequently, it should not be necessary for the court to even consider the constitutional issues. However, if it should be determined that the proceedings were valid under the Act, then, we submit, the statute is unconstitutional in the various respects discussed.

For the reasons hereinabove set forth, it is submitted that the appellants present no substantial question for the decision of this court and appellee respectfully moves that the final judgment and decree of the district court be affirmed.

Respectfully submitted,

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APPENDIX A

PERTINENT SECTIONS OF THE
DEFENSE PRODUCTION ACT OF 1950
(50 U. S. C. App. Sec. 2061 et seq.)

Section 403(a) and (b), as added 66 Stat. 300:

(U. S. C. Sec. 2103(a) and (b))

"(a) At such time as the President determines that it is necessary to impose price and wage controls generally over a substantial portion of the national economy, he shall administer such controls, and rationing at the retail level of consumer goods for household and personal use under authority of Title I of this Act (when and to the extent that he exercises such authority), through a new independent agency created for such purpose; *Provided, however,* That the President shall administer any controls over the wages or salaries of employees subject to the provisions of the Railway Labor Act, as amended, through a separate board or panel having jurisdiction only over such employees. Such agency may utilize the services, information and facilities of other agencies and departments of the Government, but such agency shall not delegate enforcement of any of the controls to be administered by it under this section to any other agency or department.

"(b) (1) There is created, in the present Economic Stabilization Agency, or any successor agency, a Wage Stabilization Board (hereinafter in this subsection referred to as the "Board"), which shall be composed, in equal numbers, of members representative of the general public, members representative of labor, and members representative of business and industry. The number of offices on the Board shall be established by Executive order.

"(2) The members of the Board shall be appointed by the President, by and with the advice and consent of the Senate. The President shall designate a Chairman and Vice Chairman of the Board from among the members representative of the general public.

"(3) The term of office of the members of the Board shall terminate on May 1, 1953. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term.

"(4) Each member representative of the general public shall receive compensation at the rate of $15,000 a year, and while a member of the Board shall engage in no other business, vocation, or employment. Each member representative of labor, and each member representative of business and industry, shall receive $50 for each day he is actually engaged in the performance of his duties as a member of the Board, and in addition he shall be paid his actual and necessary travel and subsistence expenses in accordance with the Travel Expense Act of 1949 while so engaged away from his home or regular place of business. The members representative of labor, and the members representative of business and industry, shall, in respect of their functions on the Board, be exempt from the operation of sections 281, 283, 284, 434, and 1914 of Title 18 and 99 of Title 5.

"(5) The Board shall, under the supervision and direction of the Economic Stabilization Administrator—

"(A) formulate, and recommend to such Administrator for promulgation, general policies and general regulations relating to the stabilization of wages, salaries, and other compensation; and

"(B) upon the request of (i) any person substantially affected thereby, or (ii) any Federal department or agency whose functions, as provided by law, may be affected thereby or may have an effect thereon, advise as to the interpretation, or the application to particular circumstances, of policies and regulations promulgated by such Administrator which relate to the stabilization of wages, salaries, and other compensation.

"For the purposes of this Act, stabilization of wages, salaries, and other compensation means prescribing maximum limits thereon. Except as provided in clause (B) of this paragraph, the Board shall have no jurisdiction with

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respect to any labor dispute or with respect to any issue involved therein. Labor disputes, and labor matters in dispute, which do not involve the interpretation or application of such regulations or policies shall be dealt with, if at all, insofar as the Federal Government is concerned, under the conciliation, mediation, emergency or other provisions of laws heretofore or hereafter enacted by the Congress.

"(6) Paragraph (5) of this subsection shall take effect thirty days after the date on which this subsection is enacted. The Wage Stabilization Board created by Executive Order Numbered 10161, and reconstituted by Executive Order Numbered 10233, as amended by Executive Order Numbered 10301, is abolished, effective at the close of the twenty-ninth day following the date on which this subsection is enacted. After June 27, 1952, the present Wage Stabilization Board shall issue no regulation or order except with respect to individual cases pending before the Board prior to such date."

Section 404:

(U. S. C. Sec. 2104)

"In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder."

Section 409(a) and (b):

(U. S. C. Sec. 2109(a) and (b))

"(a) Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 405 of this title, he may make application to any district court of the United States or any United States court of any Territory or other place subject to the jurisdiction of the United States for an order enjoining such acts or practices, or for an order enforcing compliance with such provision and upon a showing by the President that such person has engaged or is about to engage in

any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order shall be granted without bond.

"(b) Any person who willfully violates any provision of section 405 of this title shall be guilty of a misdemeanor and shall, upon conviction thereof, be subject to a fine of not more than $10,000, or to imprisonment for not more than one year, or both. Whenever the President has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion cause appropriate proceedings to be brought."

Section 705(b):

(U. S. C. Sec. 2155(b))

"No person shall be excused from complying with any requirement under this section, or from attending and testifying or from producing books, papers, documents, and other evidence in obedience to a subpena before any grand jury or in any court or administrative proceeding based upon or growing out of any alleged violation of this Act on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; . . ."

Section 709:

(U. S. C. Sec. 2159)

"The functions exercised under this Act shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 thereof. Any rule, regulation, or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, but no such rule, regulation, or order shall be invalid

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by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate."

Section 717, as amended 66 Stat. 306:

(U. S. C. Sec. 2166(a) and (b))

"(a) Titles I, II, III, VI, and VII of this Act and all authority conferred thereunder shall terminate at the close of June 30, 1953; and titles IV and V of this Act and all authority conferred thereunder shall terminate at the close of April 30, 1953.

"(b) Notwithstanding the foregoing—

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"(3) Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency."